IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 615

RALPH BERGER, *Petitioner*

v.

THE PEOPLE OF THE STATE OF NEW YORK

MOTION OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF URGING REVERSAL

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TABLE OF AUTHORITIES

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MOTION OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA FOR LEAVE TO FILE BRIEF, AMICUS CURIAE, URGING REVERSAL

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America is an unincorporated labor association of approximately 1,700,000 members. It moves for leave to file a brief *amicus curiae* in the above-captioned case urging reversal. While counsel for the petitioner has indicated a consent to the filing of such a brief and a copy of that consent has been lodged with the Clerk, the respondent has declined to grant consent and, accordingly, this motion for leave is being filed.

The International has for several years been concerned with problems of invasion of privacy, either governmental or non-governmental in nature. Its legislative program annually has included proposed legislation outlawing all trespassory eavesdropping.

It is the position of the *amicus* that all trespassory eavesdropping is violative of the Fourth and Fourteenth Amendments to the United States Constitution, even though having been approved pursuant to the purported authority contained in some enabling state statutes such as Section 813-a of the New York Code of Criminal Procedure. The precise question of law dealt with in the brief which the *amicus* here seeks leave to file is whether Section 813-a of the New York Code of Criminal Procedure may, consistent with the Fourth and Fourteenth Amendments to the United States Constitution, authorize trespassory room eavesdropping against a claim that such eavesdropping is an unlawful invasion of a constitutionally protected area in a search for mere evidence. It is this precise question to which the brief *amicus* will direct itself.

Counsel for *amicus curiae* in this case was also counsel in the case of *Habel* v. *New York,* No. 808, This Term, which was briefed and argued in both the Appellate Division of the New York State Supreme Court and the New York Court of Appeals simultaneously with the case at bar. The appellate court opinions in *Habel* are found at 25 App. Div. 2d 182, 268 N.Y.S. 2d 94 (1966) and 18 N.Y. 2d 148, 219 N.E. 2d 183 (1966). From the simultaneous submissions to the appellate court of the State of New York, it is believed by counsel for *amicus curiae* that their presentation of the facts and law in the case at bar will contain a somewhat

different approach than that of the parties to the case, which may be of material assistance to the Court in its disposition of the knotty problem of *ex parte* court orders purporting to authorize trespassory room eavesdropping.

Accordingly, it is respectfully requested that the brief *amicus curiae* be accepted.

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INTEREST OF AMICUS

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America is an unincorporated labor association of approximately 1,700,000 members. It has for some time been concerned with problems of invasion of privacy, either governmental or non-governmental in nature. Its legislative program annually has included proposed legislation outlawing all types of trespassory eavesdropping.[1]

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[1] The Union also has an interest in *Burkard* v. *New York* and *Habel* v. *New York*, Nos. 807 and 808, This Term, in which persons allegedly acting on behalf of the Union in a representation dispute were charged and convicted (upon a plea of guilty) in the Courts of New York on evidence secured as a result of trespassory eavesdropping. The State's motion to dismiss the appeal in those cases is presently pending.

THE CASE

This case raises, for the first time in this Court, the issue created by Section 813-a of the New York Code of Criminal Procedure which purports to authorize eavesdropping, telephonic or otherwise, upon order by a judge or a justice of a court of competent jurisdiction within the State of New York. This case presents that issue in sharp focus because of the recognition by the State and its stipulation during trial that "without the evidence, or the leads obtained, the evidence obtained through and the leads obtained from, the eavesdropping devices . . . the District Attorney had no information upon which to proceed to present a case to the grand jury, or on the basis of which to prosecute this defendant for the crimes charged in the indictment . . ." (R. 47).

The two places in which the eavesdropping occurred were in business offices, one at Room 1001, 22 West 48th Street, New York City, the office of an attorney (R. 680-682), and the other at Room 801, 15 East 48th Street, New York City, the office of a prospective liquor license applicant (R. 684-687).

THE LAW TO BE APPLIED

Under the holding in *Wolf* v. *Colorado,* 338 U.S. 25 (1949), and the cases which preceded it, a state was free to fashion its own rules with respect to the exclusion or admissibility of unconstitutionally secured evidence. States were free to permit the introduction of such evidence or not as they saw fit. New York, in common with many, if not most, other states (see Appendix to separate opinion of Mr. Justice Frankfurter in *Wolf* v. *Colorado, supra* at 33-40), had permitted the introduction of such evidence following the rule

announced in *People* v. *DeFore*, 242 N.Y. 13, 150 N.E. 585 (1926).

This concept was dramatically changed by *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and its precise holding that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." 367 U.S., at 655. And see *Ker* v. *California*, 374 U.S. 23 (1963); *Fahy* v. *Connecticut*, 375 U.S. 85 (1963); *Aguilar* v. *Texas*, 378 U.S. 108 (1963); *Stanford* v. *Texas*, 379 U.S. 476 (1964); *United States* v. *Ventresca*, 380 U.S. 102 (1964). The New York courts, as is now their constitutional obligation, follow this rule of exclusion. *People* v. *Loria*, 10 N.Y. 2d 368, 223 N.Y.S. 2d 462 (1961).

Not only is exclusion of such evidence demanded by the Fourteenth Amendment, as the cases above clearly hold, but the same standards for determining the reasonableness and validity of a search (and, necessarily, any subsequent seizure) must be applied in state as in federal courts. This is true whether the search is without a warrant, *Ker* v. *California*, 374 U.S. 23, 33 (1963), or pursuant to a warrant. *Aguilar* v. *Texas*, 378 U.S. 108, 110 (1964). This was made abundantly clear in *Aguilar:*

> "In *Ker* v. *California*, 374 U.S. 23, we held that the Fourth 'Amendment's proscriptions are enforced against the States through the Fourteenth Amendment,' and that 'the standard of reasonableness is the same under the Fourth and Fourteenth Amendments.' *Id.*, at 33. Although *Ker* involved a search without a warrant, that case must certainly be read as holding that the standard for obtaining a search warrant is likewise 'the same under the Fourth and Fourteenth Amendments'."

Accordingly, the same standards now apply in both federal and state courts, and reference to the federal cases by which such standards were published is not only appropriate but required.

FOURTH AMENDMENT PROTECTION FOR THE SPOKEN WORD

Apparently the only thing "seized" through the utilization of the eavesdropping technique in this case was the spoken word. It is by now well settled, however, that the spoken word comes within the ambit of Fourth (and, consequently, Fourteenth) Amendment protection. Originally, it had been held that the Fourth Amendment to the United States Constitution protected only material things. *Olmstead* v. *United States,* 277 U.S. 438, 464 (1938). In that case, against a claim that wire-tapping was a violation of the Fourth Amendment to the United States Constitution, a majority of the Court concluded that the language of the Amendment, itself, showed it protected only "material things —the person, the house, his papers or his effects." 277 U.S., at 464. The Court went on to observe that no case previously had held the Amendment to be violated in the absence of an official search of the defendant, a seizure of either his papers or tangible material effects or an actual physical trespass on his property, 277 U.S., at 466, and declined to go farther. Even then, this materialistic interpretation of the Fourth Amendment evoked strong dissents from Justices Holmes, Brandeis, Butler and Stone.

In *Irvine* v. *California,* 347 U.S. 128 (1954), state police officers had made a key to the defendant's house, entered in his absence, and installed a concealed microphone in the hall. On a second occasion, they entered and moved the microphone to a bedroom occupied by

the defendant and his wife, where it remained for more than a month. When the petitioner was tried for violating state gambling statutes, state officers testified as to conversations overheard by means of the microphone. At issue in *Irvine* was not whether the defendant's Fourth Amendment rights had been violated, but whether a state court conviction, so obtained, could stand. The majority of the court concluded that his conviction should be affirmed on the authority of *Wolf* v. *Colorado,* 338 U.S. 25 (1949).[2] Eight members of this Court, however, also concluded that the police officer's conduct constituted a violation of the Fourth Amendment. The real significance of *Irvine* is forever to lay to rest the notion that the Fourth Amendment does not extend protection to the spoken word. The opinions in *Irvine* destroyed what Mr. Justice Murphy, dissenting in *Goldman* v. *United States,* 316 U.S. 129, 141 (1942), had described as the "strange doctrine that keeps inviolate the most mundane observations entrusted to the permanence of paper, but allows the revelation of thoughts uttered within the sanctity of private quarters." *Irvine* has been followed more recently in *Silverman* v. *United States,* 365 U.S. 505 (1961) and *Wong Son* v. *United States,* 371 U.S. 471 (1963), in both of which this Court agreed that the spoken word was within the protection of the Fourth Amendment to the United States Constitution. In *Wong Son,* the Court commented: "It follows from our holding in *Silverman* v. *United States,* 365 U.S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects'." 371 U.S., at 485.

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[2] A different result in *Irvine* would obviously have been required had the case arisen after *Mapp* v. *Ohio, supra.*

CONSTITUTIONALLY PROTECTED AREAS

This Court has "been far from niggardly in construing the physical scope of Fourth Amendment protection." *Lanza* v. *New York,* 370 N.Y. 139, 143 (1962). In addition to the home, which none would assert falls without the Fourth Amendment protection, the Amendment has been construed to include a business office, *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385 (1920); a store, *Amos* v. *United States,* 255 U.S. 313 (1921); a hotel room, *United States* v. *Jeffers,* 342 U.S. 48 (1951); an apartment, *Jones* v. *United States,* 362 U.S. 257 (1960); an automobile, *Carroll* v. *United States,* 267 U.S. 132 (1925); an occupied taxi cab, *Rios* v. *United States,* 364 U.S. 253 (1960); a desk in a government office, *United States* v. *Blok,* 188 F. 2d 1019 (D.C. Cir. 1951); and an occupied telephone booth, *United States* v. *Stone,* 232 F. Supp. 396 (N.D. Tex. 1964); *United States* v. *Madison,* 32 U.S. Law Week 2243 (D.C. Gen. Sess. 11-18-63); *contra United States* v. *Borgese,* 235 F. Supp. 286 (S.D.N.Y. 1964). Each of these decisions, save the latter four, was reaffirmed in *Lanza* v. *New York, supra,* with the added caveat that the ultimate scope of the Amendment is yet to be reached. 370 U.S., at 143. It follows, therefore, that the places within which the eavesdropping occurred, two business offices *(Silverthorne Lumber Co.* v. *United States, supra),* are within the area of Fourth (and, consequently, Fourteenth) Amendment protection. It further follows from that fact that anything seized therefrom by state officers, unless pursuant to constitutional authority, was inadmissible under *Mapp* v. *Ohio, supra.*

TRESPASSORY EAVESDROPPING

No extensive discussion is necessary to establish the proposition that eavesdropping, *accomplished or accompanied by a trespass,* constitutes a Fourth Amendment violation. Again, *Silverman* v. *United States, supra,* together with *Lopez* v. *United States,* 373 U.S. 427 (1963), supply the complete answer. In *Silverman,* the famous "spike-microphone case" in which a foot long spike attached, in turn, to a microphone, amplifier, power pack and earphones was inserted under the baseboard on the opposite side of the party-wall, 365 U.S., at 506,[3] the Court was unanimous in holding:

> "Eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in which a closely divided Court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights." 365 U.S., at 510.

The Court, still unanimous, then went on to state the rationale behind its decision:

> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick* v. *Carrington,* 19 Howell's State Trials 1029, 1066; *Boyd* v. *United States,* 116 U.S. 616, 626-630. This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe

[3] The procedure was described by the dissenting judge in the Court of Appeals for the District of Columbia Circuit at 275 F. 2d 173, 179.

> or listen, and relate at the man's subsequent criminal trial what was seen or heard." 365 U.S., at 511-512 (footnote omitted.)

A few years later, this Court reversed a state court conviction under almost identical circumstances. *Clinton* v. *Virginia,* 377 U.S. 158 (1964).

The full import of the *Silverman* language is found in the later case of *Lopez* v. *United States,* 373 U.S. 427, 438-439 (1963), in which the Court observed:

> "The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. See, e.g., *Olmstead* v. *United States,* 277 U.S. 438; *Goldman* v. *United States,* 316 U.S. 129. *It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. Silverman* v. *United States, supra.*" (Emphasis supplied.)

Thus, "an unlawful physical invasion" of the areas in question (which the *amicus* has already established to be constitutionally protected areas) would render inadmissible any evidence derived therefrom.

The fact of a "physical invasion" is clear from the record. It is undisputed that the room-type electronic eavesdropping device here used was effected by installing a concealed microscope in the respective offices, that the method of transmission to a recording device in a nearby building was by wiring the microphone to unused telephone wires found in the room, and that installation required secret physical entry into the room. (R. 294-295, 300-311)

COULD A SEARCH WARRANT ISSUE?

Section 813-a, Code of Criminal Procedure, provides, in pertinent part:

> "An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, *that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations, or discussions are to be overheard* or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved." (Emphasis supplied.)

To pass the muster of constitutionality, however, this statute must be matched against and tested by the "warrant clause" of the Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and *no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.*" (Emphasis supplied.)

No eavesdropping order may properly issue unless a constitutionally valid search warrant could be obtained.

And, for a whole host of reasons, *amicus* asserts that no constitutionally valid warrant could be issued under the circumstances here shown.

(a) Search For and Seizure of Evidence

The authorizing order in each case recites: "that there is reasonable ground to believe that evidence of crime may be obtained by overhearing and recording the conversations, communications, and discussions that may take place in [the respective premises] . . ." (R. 680, 684) *The constitutional vice in each case is that a warrant may not issue simply to secure evidence.*

The law is clear on this aspect of the case. A search simply for incriminating evidence has been barred since common law days. In *Entick* v. *Carrington,* 19 How. St. Tr. 1030, 1073 (1765), the case from which our concept of unlawful search and seizure emanates, see *Boyd* v. *United States,* 116 U.S. 616, 626-627, 630 (1886), Lord Camden observed:

> "Lastly it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering *evidence.* I wish some cases need have been shown, where the law forceth *evidence* out of the owner's custody by process * * * In the criminal law such a proceeding was never heard of * * *.
>
> * * * * *
>
> "It is very certain that the law obligeth no man to accuse himself; * * * and it would seem that a *search* for *evidence* is disallowed on the same principle."

And this Court has adopted this rule by pointing out that search warrants may constitutionally be issued only for instruments of crime, fruits of crime and

contraband. *Boyd* v. *United States, supra; Weeks* v. *United States,* 232 U.S. 383 (1914). As specifically held in *Gouled* v. *United States,* 255 U.S. 298, 309 (1920), a search warrant may not be used as a means of gaining access "solely for the purpose of making search to secure evidence." The Court recently restated the distinction in *Harris* v. *United States,* 331 U.S. 145, 154 (1947):

> "Furthermore, the objects sought for and those actually discovered were properly subject to seizure. This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."

See also *Lopez* v. *United States,* 373 U.S. 427, 456-457 (1963) (dissenting opinion of Mr. Justice Brennan); *Schmerber* v. *California,* 384 U.S. 757, 768, n. 10 (1966).[4]

The eavesdropping orders in question clearly and precisely violate this canon, in that they are sought and issued for only one purpose—the seizure of testimonial utterances as evidence. This, alone, is constitutionally impermissible.

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[4] As Circuit Judge Jerome Frank said, dissenting in *United States* v. *On Lee,* 193 F. 2d 306, 314, n. 17 (2d Cir. 1951):

> "A search warrant must describe the things to be seized, and those things can be only (1) instrumentalities of the crime or (2) contraband. Speech can be neither."

(b) Lack of Precision

A constitutional imperative for a valid warrant is that it describe with precision what is to be seized. In *Marron* v. *United States,* 275 U.S. 192, 196 (1927), this Court stated:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*" (Emphasis supplied.)

This quotation from *Marron* was recently cited with approval in *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965), in which a search warrant no more general than the one at bar was invalidated, the Court saying, unanimously:

> "For we think it is clear that this warrant was of the kind which it was the purpose of the Fourth Amendment to forbid—a general warrant.
>
> * * * * *
>
> The indiscriminate sweep of that language [i.e., the language of the warrant] is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, false to its history." 379 U.S., at 480, 486.

The same observations must be made of the eavesdropping authorization in the case at bar—"any and all conversations, communications and discussions" (R. 680, 684). This must unquestionably be the general warrant condemned by the Fourth Amendment and *Stanford* v. *Texas, supra.*

(c) Lack of Probable Cause

The constitutional requirement of probable cause is perhaps best, and most recently, set out in *Aguilar* v. *Texas,* 378 U.S. 108, 114-115 (1964):

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones* v. *United States,* 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf* v. *United States,* 376 U.S. 528, was 'credible' or his information 'reliable'. Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime', *Giordenello* v. *United States, supra,* at 486; *Johnson* v. *United States, supra,* at 14, or as in this case, by an unidentified informant." (footnote omitted.)

Thus, the decision as to probable cause [or, under Section 813-a, Code of Criminal Procedure, "reasonable ground to believe"] must be determined by an independent judicial officer, *United States* v. *Lefkowitz,* 285 U.S. 452, 464 (1932), must be based upon an affidavit (Fourth Amendment, itself), which, in turn, must contain sufficient background information so that the judicial officer can make his independent determination, *Aguilar* v. *Texas, supra,* and, while it may be predicated upon an informant whose name need not be

revealed, there must be some information "from which the officer concluded that the informant . . . was 'credible' or his information reliable." *Aguilar* v. *Texas, supra.* It is on this latter point that both eavesdropping orders must fail.

The underlying affidavits merely recite: "This office has received information . . ."; "Evidence is presently in the possession of this office . . ."; "This office presently has evidence . . .". (R. 681-682, 685) Or, "[t]his office has obtained evidence . . .". (R. 685) Nothing appears which even remotely suggests the reliability of the information and nothing on which the "neutral and detached Magistrate [which] the Constitution requires" could make an evaluation of the reliability. For that reason, alone, the first eavesdropping order must fail. *Aguilar* v. *Texas, supra.*

The subsequent order is at least partially dependent upon evidence from the first. Thus, the affidavit supporting the second order recites:

> "In the course of this investigation, over a duly authorized eavesdropping device installed in the office of the aforesaid Harry Meyer, evidence has been obtained . . ." (R. 686)

Thus, the subsequent order is predicated upon evidence which was unconstitutionally seized. The state may not "boot strap" itself in such a way as to avoid the argument of unconstitutionality. Although the question of whether a valid warrant may be partially premised upon evidence seized constitutionally was specifically left open in *Silverman* v. *United States,* 365 U.S. 505,

507, n. 1 (1961), to uphold its use in such a way would be to transgress the basic canon laid down by Mr. Justice Holmes in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 391-392 (1920), that the government may not use illegally seized evidence to enable it to obtain valid evidence through legal process. "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence shall not be used before the court, *but it shall not be used at all.*" Id. at 392. (Emphasis supplied.)

Moreover, the affidavits in support of both orders state only conclusions and run afoul of the principle of *Giordenello* v. *United States,* 357 U.S. 480, 486 (1956), that "the Commissioner must judge for himself the persuasiveness *of the facts* relied on by a complaining officer . . . He should not accept without question the complainant's *mere conclusion* . . ." (Emphasis supplied.)

CONCLUSION

For the foregoing reasons, *amicus* asserts the unconstitutionality of any evidence secured pursuant to room eavesdropping accompanied by a physical trespass, even if accomplished pursuant to Section 813-a of the New York Code of Criminal Procedure. Should that position not be accepted, *amicus* further asserts that the underlying affidavits in the case at bar do not meet the constitutional requirements of a search warrant and, accordingly, evidence secured thereby must be excluded. For either, or for both, of these reasons,

amicus asserts that the conviction in the case at bar must be reversed.

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